STATE OF MICHIGAN

COURT OF APPEALS

ANISEH ELJAHMI, Deceased,

Plaintiff,

v

HANNIE ELGARMI,

Defendant-Appellant,

v

ABDU ELJAHMI and LOWZA ELJAHMI,

Intervening Plaintiffs-Appellees.

UNPUBLISHED
November 30, 2006

No. 270848
Wayne Circuit Court
LC No. 01-108659-DM

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right the order setting aside the ex parte order granting defendant sole legal and physical custody of his minor child and suspending defendant's parenting time with the minor child following the death of plaintiff. We vacate and remand to the trial court for further proceedings consistent with this opinion.

I. FACTS

Defendant and plaintiff were married in 1997, and their only child, Eman, was born in 1999. Plaintiff filed for divorce in 2001, and a default judgment of divorce was entered awarding plaintiff sole physical and legal custody of Eman. Defendant received "reasonable but supervised parenting time" and was ordered to pay child support. Plaintiff and Eman then resided with intervening plaintiffs, who are plaintiff's parents. The record below is not entirely clear, but it seems that over the next two and a half years, defendant accumulated a significant support arrearage and did not have any contact with Eman. There is some possibility that defendant may have threatened or assaulted plaintiff and indicated to her that he would rather be imprisoned for murder than pay child support. In 2003, defendant filed a motion seeking unsupervised visitation time and a reduction in child support. The trial court awarded defendant supervised parenting time that was to be, and apparently actually was, later increased to include some unsupervised parenting time. Defendant paid at least some of the child support arrearage. Defendant also engaged in some visitation with Eman, although the record does not clearly

indicate how much. Plaintiff and Eman continued to reside with intervening plaintiffs, and Eman apparently remains with intervening plaintiffs today.

On April 13, 2006, plaintiff was fatally shot multiple times outside her home while getting Eman out of her vehicle. Intervening plaintiffs filed a guardianship petition on May 15, 2006, in the Wayne County Probate Court. A copy of that petition was mailed to defendant, and a hearing on the petition was scheduled for May 18, 2006. On May 17, 2006, defendant filed an ex parte emergency motion in the trial court seeking custody of Eman. The same day, without conducting a hearing, Judge Richard B. Halloran, acting in the absence of Judge Helen E. Brown, entered an order awarding defendant sole legal and physical custody of Eman and ordering intervening plaintiffs to turn Eman over to defendant. Intervening plaintiffs apparently did not learn of the ex parte order until the probate court hearing, where the probate judge informed them that the guardianship proceeding was precluded by the ex parte order. Intervening plaintiffs then moved to intervene and to contest the ex parte custody award. At a six-minute hearing, defendant conceded that he was one of several parties in whom the police were "interested" regarding plaintiff's murder, but asserted that intervening plaintiffs lacked standing. The trial court expressed displeasure with Judge Halloran's entry of the ex parte order and with defendant's objections. The trial court set aside the ex parte order and stated that custody would remain with intervening plaintiffs until defendant was "cleared," and defendant's visitation was indefinitely suspended. Defendant now appeals.

II. STANDING OF INTERVENING GRANDPARENTS

Defendant contends that the maternal grandparents lacked standing to intervene in his ex parte emergency motion to secure custody of the minor child.

A. Standard of Review

This Court reviews de novo whether a party has standing. *Higgins Lake Property Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 89; 662 NW2d 387 (2003). In addition, three standards of review apply to cases involving child custody. Factual findings are reviewed under the great weight of the evidence standard and will be affirmed unless the evidence clearly preponderates otherwise. *Vodvarka v Grasmeyer*, 259 Mich App 499, 507; 675 NW2d 847 (2003), citing *Fletcher v Fletcher*, 229 Mich App 19, 24; 581 NW2d 11 (1998). In reviewing the findings, we defer to the trial court's determination of credibility. *Mogle v Scriver*, 241 Mich App 192, 201; 614 NW2d 696 (2000). Discretionary rulings, including an ultimate determination of custody, are reviewed for an abuse of discretion. *Foskett v Foskett*, 247 Mich App 1, 5; 634 NW2d 363 (2001). Questions of law in custody cases are reviewed for clear legal error. *Fletcher, supra*, p 24, citing MCL 722.28.

B. Analysis

A third party may initiate a custody action only under very specific conditions and circumstances. MCL 722.26c. While the grandparents may have difficulty initiating a custody action due to their failure to meet certain statutory criteria necessary to establish standing, that does not preclude the grandparents from being considered or awarded custody of the minor child.

In accordance with prior rulings by the Michigan Supreme Court, a third party, including grandparents, "generally 'cannot create a custody dispute by simply filing a complaint in circuit court alleging that giving legal custody to the third party is in the best interests of the child.'" *Heltzel v Heltzel*, 248 Mich App 1, 28-29; 638 NW2d 123 (2001), quoting *Bowie v Arder*, 441 Mich 23, 48-49; 490 NW2d 568 (1992). Further, "a third party does not attain a legal right to a child's custody merely on the basis of the fact that the child has resided with the third party." *Heltzel, supra,* p 29, citing *Bowie, supra,* p 45. However, the factual circumstances of this case are distinguishable.

Defendant initiated this custody dispute by his custody petition to the circuit court. It has been recognized that although no general authority exists that permits a nonparent to create a child custody "dispute" by merely filing pleadings and averring that the placement of custody with the third party conforms to the child's best interests, "custody may be awarded to grandparents or other third parties according to the best interests of the child in an appropriate case. *Heltzel, supra,* p 29. The award of custody to a third party is not based on the legal right of the third party to have custody of the minor child, but rather on a trial court's determination regarding what is in the child's best interests. *Id.* at 30, citing *Bowie, supra,* p 49 n 22.

MCL 722.27(1) provides the trial court with jurisdiction over the custody of the minor child in a dispute between the grandparents and defendant. The only threshold requirement, which must be met, is that the custody action is properly before the court. *Terry v Affum (On Remand),* 237 Mich App 522, 533; 603 NW2d 788 (1999). "The term 'child custody dispute' is generally used broadly throughout the Child Custody Act 'to mean any action or situation involving the placement of a child.'" *Sirovey v Campbell*, 223 Mich App 59, 68; 565 NW2d 857 (1997), quoting *Frame v Nehls*, 452 Mich 171, 179; 550 NW2d 739 (1996). Defendant's ex parte emergency motion to obtain custody of the minor child meets the definitional and threshold requirements as creating "an action or situation involving the placement of a child." *Sirovey, supra,* p 68. Having obtained jurisdiction through the prior divorce proceedings in this matter, the circuit court had jurisdiction over custody issues that subsequently arose. MCL 552.17a(1). [TEXT OMITTED]

A procedural error did occur however by the failure of the trial court to follow proper procedure in the award of custody to the grandparents. An award of child custody can be modified, pursuant to MCL 722.27(1)(c), for "proper cause shown" or "[a] change of circumstances" establishing the modification to be in the child's best interest. MCL 722.27(1)(c); *Foskett, supra*, p 5. Before custody can be changed, an evidentiary hearing must be conducted. *Schlender v Schlender*, 235 Mich App 230, 233; 596 NW2d 643 (1999). In situations that involve a custody dispute between a natural parent and a third party, while the child's best interests remain the predominant consideration, MCL 722.23; *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001), the presumptions made are somewhat different from those in custody disputes solely involving parents. Specifically, this Court has determined and explained:

> In every custody dispute involving the natural parent of a child and a third-person custodian, the strong presumption exists, however, that parental custody serves the child's best interests. We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's

> best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interests concerns . . . taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person. Only when such a clear and convincing showing is made should a trial court infringe the parent's fundamental constitutional rights by awarding custody of the parent's child to a third person. [*Heltzel, supra,* pp 27-28 (footnotes omitted).]

In accordance with MCL 722.25, a custody dispute is required to be resolved in the best interest of the minor child, with the trial court making determinations based on the best interest factors elucidated in MCL 722.23. A trial court is required to consider and explicitly state its findings and conclusions regarding each of these factors. *Foskett, supra,* p 9. While the trial court is not required to comment on every matter in evidence or declare its acceptance or rejection of every proposition asserted, nor attribute equal weight to each factor, it must still "evaluate each of the factors contained in the Child Custody Act, MCL 722.23 . . . and state a conclusion on each, thereby determining the best interests of the child." *Thompson v Thompson,* 261 Mich App 353, 363; 683 NW2d 250 (2004) (citations omitted). The trial court committed error because it failed to follow this very clear mandate and ordered the change in custody without conducting an evidentiary hearing.

Furthermore, pursuant to MCL 722.27(1)(e), a trial court may "take any other action considered to be necessary in a particular child custody dispute," even if the court determined that an emergency situation necessitated a change of custody, "[s]uch a determination . . . can only be made after the court has considered facts established by admissible evidence – whether by affidavits, live testimony, documents, or otherwise." *Mann v Mann*, 190 Mich App 526, 533; 476 NW2d 439 (1991). There is no indication within the record to verify anything that the trial court relied on to make its custody determination, other than an intention to maintain the status quo for the child and concern that defendant was a "person of interest" in plaintiff's murder. While consideration of these factors by the trial court is not, in and of itself inappropriate, these factors are insufficient because of the failure of the trial court to conduct or make an independent determination of the best interest factors. *Brown v Loveman,* 260 Mich App 576, 597; 680 NW2d 432 (2004). Unfortunately, the trial court did not follow the necessary procedural requirements to properly effectuate any custody change. Therefore, to assure the best interests of the child, the trial court's ruling on custody is vacated and remanded for a full evidentiary hearing. The remainder of defendant's issues on appeal need not be addressed given our resolution of the propriety of the custody determination.[1]

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[1] The unique nature of the facts and circumstances of this case cry out for a determination by the Michigan Legislature to provide a clearer way for grandparents to establish standing in child custody cases. This is particularly evident when a parent or parents die or are unable to provide a secure and safe custodial environment.

We vacate and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Bill Schuette